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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 494

TERESSA COLE, Individually and as Administratrix of the Estate of Rogers L. Cole, Deceased,
Petitioner,

VERSUS

SUNRAY DX OIL COMPANY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to Review the Decision of the Supreme Court of Oklahoma.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE REQUEST FOR A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE SUPREME COURT OF OKLAHOMA

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September, 1969

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OPINION BELOW

The opinion rendered by the Supreme Court of Oklahoma is reported in 38 Okla. Bar Journal 2538, and with the correction of June 3, 1969, is reported in ..... P.2d .....

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I

Whether a conservation order of the Oklahoma Corporation Commission establishing drilling and spacing units for the production of oil and gas pursuant to 52 Okla. Statutes, Section 87.1, constitutes an impairment of contract under Article I, Section 10, of the United States Constitution?

II

Whether notice of hearing of the Oklahoma Corporation Commission pursuant to 52 Okla. Statutes, Section 87.1(a), constitutes due process under the Fourteenth Amendment to the United States Constitution?

STATUTES INVOLVED

The statute involved is 52 Okla. Statutes, Section 87.1 (a) and (d), and is set forth in the appendix to this Brief.

STATEMENT OF THE CASE

This action was for the cancellation of an oil and gas lease. The lease covered 190 acres. Sixty acres of the land were located in the North half of the section and the remainder in the South half. The North half of the section was placed in a 320-acre drilling unit for the production of gas by an Order of the Oklahoma Corporation Commission. A gas well was completed in the North half of the section prior to the anniversary date of the lease. The question in the case was whether the respondent was required to pay

delay rentals or whether the lease was held by unit production. The Oklahoma Supreme Court held that the lease was in force and effect by reason of unit production, and that delay rentals were not required to be paid.

The petitioner omitted the following relevant facts from the discussion of the case under the title "The Facts Material To The Questions Presented":

1. There was stricken from the printed form of oil and gas lease a provision authorizing the *voluntary* pooling of the lease with other acreage to form a unit of 640 acres for the production of gas. The lease as modified permitted voluntary units at the election of lessee of 40 acres in size for the production of oil.

2. There was stricken from the printed form of oil and gas lease a *force majeure* clause which provided that the lease shall be subject to Federal and State laws, and provided that the lease shall not be terminated for failure to comply therewith.

3. Notice of the application for the Spacing Order before the Oklahoma Corporation Commission was given to the petitioner by publication as required by 52 Oklahoma Statutes, Section 87.1(a) and pursuant to the rules of the Oklahoma Corporation Commission. The petitioner had constructive notice of the hearing.

4. There is no admission that the respondent did not disclose pertinent geological information to the Oklahoma Corporation Commission.

5. During the pendency of the appeal in the Oklahoma Supreme Court, the Oklahoma Corporation Commission did

not find that the original spacing order could not be sustained but on the contrary found, due to a changed condition by the discovery of oil in the South of the section, that the drilling pattern should be changed.

SUMMARY OF ARGUMENT

1. Oil and gas well spacing and establishment of drilling units under 52 Oklahoma Statutes, Section 87.1, does not constitute impairment of contract under Article I, Section 10, of the United States Constitution.

2. The notice of hearing required under 52 Oklahoma Statutes, Section 87.1(a) constitutes "due process" under the Fourteenth Amendment to the United States Constitution.

REASONS FOR DENYING THE WRIT

1. THE DECISION OF THE OKLAHOMA SUPREME COURT IN HOLDING THAT 52 OKLAHOMA STATUTES, SECTION 87.1, DOES NOT CONSTITUTE THE IMPAIRMENT OF CONTRACT UNDER ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION, IS CORRECT.

52 Oklahoma Statutes, Section 87.1, authorizes the Oklahoma Corporation Commission to establish oil and gas drilling units under the police powers of the State. The purpose of the statute is to prevent waste, conserve the natural resources of the State, and to protect the correlative rights of the mineral owners.

Under this statute the Oklahoma Corporation Commission is authorized after notice and hearing to establish drilling units where there is a common source of supply

of oil or gas. The Commission is authorized to pool or unitize two or more separately owned tracts. Where two or more separately owned tracts are unitized, the production is allocated to each separately owned tract on an acreage basis.

In the case at bar, the petitioner was the owner of 60 acres in a 320-acre unit. The petitioner, as a royalty owner, was entitled to 60/320 royalty interest in the unit production on the basis of the royalty provision in the lease. The unit production held the lease in force and effect as provided in the lease.

The trial court recognized the power of the Oklahoma Corporation Commission to establish drilling units when it concluded as a matter of law as follows:

> "Every Oklahoma oil and gas lease is subject to the police power of the State of Oklahoma through its Corporation Commission." (See Petitioner's Brief, Appendix, p. ii.)

This Court in *Patterson* v. *Stanolind Oil & Gas Company,* 305 U.S. 376, 59 S.Ct. 259, 83 L.Ed. 231, held this Well-Spacing Act was constitutional, and not an impairment of contractual rights. The *Patterson* case was an appeal from the decision of the Oklahoma Supreme Court in *Patterson* v. *Stanolind Oil & Gas Company,* 182 Okla. 155, 77 P.2d 83.

The Oklahoma Supreme Court in the *Patterson* case held in part as follows:

> "Thus, in our opinion, it is well established that the police power of the state extends to protecting the correlative rights of owners in a common source of

oil and gas supply and this power may be lawfully exercised by regulating the drilling of wells into said common source of supply and distributing the production thereof among the owners of mineral rights in land overlying said common source of supply. * * *, since the plaintiff's mineral deed did not grant him the benefit, use, or possession of any definite amount of minerals nor the right to reduce any certain amount of minerals to possession, but only gave him an ownership in the oil and gas that might be captured or reduced to possession, and since the right to capture from a common source of supply may be limited or restricted by the state, it may be said that such a grant can confer no right or title in property that is not already subject to being limited, restricted, or modified by the state's said power. *The extent of private contract in such matters being at all times subject to limitation by the inherent police power of the state, any muniment of title is impotent to assume or to convey any property right in the common source of supply superior to or entirely independent of said sovereign power.* Thus, in our opinion, the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the State or Federal Constitution which prohibit the taking of property without just compensation or without due process of law and forbid the impairment of contract obligations. As we view it, the property here involved has not been taken or confiscated; its use has merely been restricted and qualified. This does not violate the due process clause of either Constitution. And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect * * *." (Italics supplied.)

The point raised by the petitioner that the Well-Spacing Act constitutes impairment of contracts has been previously decided by this Court adversely to the petitioner and certiorari should not be granted.

2. THE NOTICE OF HEARING REQUIRED UNDER 52 OKLAHOMA STATUTES 87.1(a) CONSTITUTES "DUE PROCESS" UNDER THE FOURTEENTH ADMENDMENT TO THE UNITED STATES CONSTITUTION.

The Well-Spacing Act provides that the Commission shall give at least fifteen days' notice of the hearing, by one publication in some newspaper of general circulation in Oklahoma City, Oklahoma, and by one publication, at least fifteen days prior to the date of the hearing, in some newspaper in the county in which the land is situated. The notice in the case at bar was duly given as provided by the Well-Spacing Act.

The Well-Spacing Act does not require personal service of notice for the establishment of drilling units.

In *Patterson* v. *Stanolind,* 305 U.S. 376, 59 S.Ct. 259, 83 L.Ed. 231, this Court held that the Well-Spacing Act does not violate the due process clause of the Fourteenth Amendment. This Court in *Barbier* v. *Connolly,* 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923, in discussing the effect on the "due process" clause on the "police powers," said:

> "The 14th Amendment, in declaring that no State 'Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary

spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. * * *"* (Italics supplied.)

The Supreme Court of Oklahoma, in the case of *State* v. *Bond*, 172 Okla. 415, 45 P.2d 712, fully approved of the form of the notice which was given in the case at bar. The Court in approving of the form of the notice said in part as follows:

"(1) Relator first contends that the order is void as to him for the reason that it was entered without the notice required to be given by Section 14, c. 131, Sess. Laws 1933. From an examination of the notice and the proof of publication thereof, we conclude that there

is no merit to this contention. The notice was published; it designated the time and place of hearing; it referred to the Wilcox Zone or common source of supply in the Oklahoma City field, and specified briefly the nature of the orders, rules, and regulations sought, among others the following: '(c) Such other rules and regulations as may seem proper, equitable or necessary for the prevention of waste and the prevention of inequitable and unfair taking of oil from the common source of supply.' This notice does not offend or violate the 'due process' clause of the Constitution of Oklahoma (article 2, § 7), State ex rel. Caldwell v. Hooker, 22 Okl. 712, 98 P. 964, nor the Fourteenth Amendment to the Federal Constitution, Bellingham Bay & British Columbia R. Co. v. City of New Whatcom, 172 U.S. 314, 19 S.Ct. 205, 43 L.Ed. 460; Londoner v. City & County of Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103."

The case of *Oklahoma Natural Gas Co.* v. *Long,* 406 P.2d 499 (Okla.), was an action to cancel an oil and gas lease. The petition, as in the case at bar, alleged that delay rentals had not been paid and that no well was commenced on the leased premises. The lease in question had a primary term of 10 years. It was dated January 23, 1951, and covered the SE/4 of Section 32. Delay rentals were paid to January 23, 1957. In July of 1956, a well was completed in the NE/4 of Section 32. On October 16, 1956, the Corporation Commission created a 640-acre drilling and spacing unit covering Section 32. Mr. Justice Lavender, speaking for the Court, in holding that the unit well continued the lease in force and effect without the payment of delay rentals or the drilling of a well on the leased premises, said in part as follows:

"The case before us involves the following question: Under an oil and gas lease by the terms of which the lessee is obligated to either commence the drilling of a well upon the leased premises within one year or pay to the lessor a stipulated sum as delay rental, will the drilling of such a well upon lands other than the leased premises but located within the same well spacing unit relieve the lessee of his obligation to pay any further delay rentals?

* * * * * * * *

"The plaintiffs' contention that to construe a well-spacing order so that the effect of same is to nullify the delay rental provisions of an oil and gas lease would render the act under which the well-spacing order was authorized unconstitutional and void is not well taken.

"The plaintiff has not been deprived of any rights provided for him in the lease agreement except to have a well drilled on his property, and this right is subject to limitation by act of the Corporation Commission. As we have heretofore pointed out, the lessor could not have the well drilled from which he will receive his proportionate share of the royalty and at the same time receive delay rentals, because the well was not drilled on his specific property. *When this lease was entered into the parties knew of the authority of the Oklahoma Corporation Commission to enact well-spacing regulations in furtherance of conserving oil and gas, and they contracted subject thereto* * * *." (Italics supplied.)

In *Oklahoma Natural Gas Co.* v. *Choctaw Gas Co.*, 236 P.2d 970, 976 (Okla.), the Court in holding that the Corporation Commission had the right under the police powers to regulate the conservation of oil and gas:

"It is recognized that a valid exercise of the police power (as delegated to the Corporation Commission

by statute) which limits or infringes upon private rights does not, ipso facto, violate the due process clauses of the state or Federal constitutions. Generally regulation of a private business tinged with a 'public interest' constitutes a valid exercise of the police power. * * *"

See also *Palmer Oil Corporation* v. *Amerada Petroleum Corporation*, 343 U.S. 390, 72 S.Ct. 842, 96 L.Ed. 1022, and *Champlin Refining Company* v. *Corporation Commission*, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062.

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, cited by the petitioner is not in point in that it does not involve the police powers of the State nor legislative action by an administrative tribunal. We have hereinabove cited *Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okla. 155, 77 P.2d 83, 305 U.S. 376, 59 S.Ct. 259, 83 L.Ed. 231, and we again wish to quote from this case. At page 160 of the Oklahoma Report, the Court said:

"Thus, in our opinion, the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the state or federal Constitution which prohibit the taking of property without just compensation or without due process of law and forbid the impairment of contract obligations. As we view it the property here involved has not been taken or confiscated; its use has merely been restricted and qualified. This does not violate the due process clause of either Constitution. And this would be true even though the plaintiff were able to prove a distinct loss to himself through the operation of the statutes putting said police power into force and effect."

The Court then answered the argument that there was an unlawful delegation of legislative power to the Corporation Commission saying, at page 161:

> "This argument assumes that the Corporation Commission is nothing more than an administrative body, and herein lies one of its fallacies. By the Constitution itself, the Corporation Commission was granted powers over transportation and transmission companies *which are legislative and judicial as well as executive in their nature,* and the extension by legislative enactment of the field over which these powers can be exercised is authorized by section 35, article 9, of the Constitution. Russell v. Walker, 160 Okl. 145, 15 P.2d 114." (Italics supplied.)

Continuing at page 161, the Court said:

> "Though we believe in the principle that an act whose enforcement is trusted to any agency of the government should be definite and certain enough to let the agency know what the Legislature intended to provide for and how the legislative will is to be carried out in the administration and enforcement of the act, still we must also recognize that there are certain subjects of legislation in which the application of this principle is necessarily limited. *In our estimation, well-spacing is such a subject.* We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil producing area should be divided into drilling units and what size and shape the units should be." (Italics supplied.)

There is no necessity of notice prior to a legislative act. In *Georgia* v. *City of Chattanooga,* 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796, 800, the State of Georgia owned a tract of land in the State of Tennessee that the City of Chatta-

nooga needed for street purposes and an ordinance was passed declaring the necessity of such street use. In dismissing the State of Georgia's argument that it had no notice of the intended hearing on the subject, the Court said:

> "The lack of opportunity to be heard before the passage of the ordinance opening the street furnishes no ground for complaint. The taking is a legislative, and not a judicial, function, and an opportunity to be heard in advance need not be given. Bragg v. Weaver, 251 U.S. 57, 58, 64 L.Ed. 135, 136, 40 S.Ct. Rep. 62. Personal service upon the owner is not essential; publication of notice is sufficient. Bragg v. Weaver, supra, 59, 61."

Petitioner cites *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333. This case is likewise not in point for the reason that subdivisions (c) (4) of Section 77 of the Bankruptcy Act "is designed to enable the court to serve personal notice on creditors."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari be denied.

Respectfully submitted,

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September, 1969

APPENDIX

52 Oklahoma Statutes, Section 87.1

§ 87.1 Common source of supply of oil—Well spacing and drilling units

Whenever the production from any common source of supply of oil or natural gas in this State can be obtained only under conditions constituting waste or drainage not compensated by counter-drainage, then any person having the right to drill into and and produce from such common source of supply may, except as otherwise authorized or in this Act[1] provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the wells or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

Establishment of Units

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma; provided, that the Commission may authorize the drilling of an additional well or wells on any spacing and drilling unit or units or any portion or portions thereof or may establish, re-establish, or re-form well spacing and

drilling units of different sizes and shapes when the Commission determines that a common source of supply contains predominantly oil underlying an area or areas and contains predominantly gas underlying a different area or areas; provided further that the units in the predominantly oil area or areas shall be of approximately uniform size and shape, and the units in the predominantly gas area or areas shall be of approximately uniform size and shape, except that the units in the gas area or areas may be of nonuniform size and shape when they adjoin the units in the oil area or areas; provided further that the drilling pattern for such nonuniform units need not be uniform, and provided further that the Commission shall adjust the allowable production within said common source of supply, or any part thereof, and take such other action as may be necessary to protect the rights of interested parties. Any order issued pursuant to the provisions hereof may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen (15) days' notice of the hearing to be held upon such petition by one publication at least fifteen (15) days prior to said hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of said hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 84 to 135, inclusive, of Title 52, Oklahoma Statutes of 1951, shall govern all proceedings and hearing provided for by this section. * * *

Violations or order—Separately owned tracts or undivided interest—Pooling costs

(d) The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two (2) or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit. All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas. The portion of the production allocated to the owner of each tract or interests included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon.

[APPENDIX]

Such pooling order of the Commission shall make definite provisions for the payment of cost of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon. The operator of such unit, in addition to any other right provided by the pooling order or orders of the Commission, shall have a lien on the mineral leasehold estate or rights owned by the other owners herein and upon their shares of the production from such unit to the extent that costs incurred in the development and operation upon said unit are a charge against such interest by order of the Commission or by operation of law. Such liens shall be separable as to each separate owner within such unit, and shall remain liens until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order. The Commission is specifically authorized to provide that the owner or owners drilling, or paying for the drilling, or for the operation of a well for the benefit of all shall be entitled to production from such well which would be received by the owner, or owners, for whose benefit the well was drilled or operated, after payment of royalty, until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order or order settling such dispute. No part of the production or proceeds accruing to any owner of a separate interest in such unit shall be applied toward payment of any cost properly chargeable to any other interest in said unit.

For the purpose of this Act[1] the owner, or owners, of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (7/8) interest in and to said rights and a lessor to the extent of the remaining one-eighth (1/8) interest therein.

Should the owners of separate tracts or interests embraced within a spacing unit fail to agree upon a pooling of their interests and the drilling of a well on the unit, and should it be established by final, unappealable judgment of a court of competent jurisdiction that the Commission is without authority to require pooling as provided for herein, then subject to all other applicable provisions of this Act, the owner of each tract or interest embraced within a spacing unit may drill on his separately owned tract, and the allowable production therefrom shall be that portion of the allowable for the full spacing unit as the area of such separately owned tract bears to the full spacing unit.

In the event a producing well, or wells, are completed upon a unit where there are, or may thereafter be, two (2) or more separately owned tracts, any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within the unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; provided, where a lease covering any such separately owned tract or interest included within a spacing unit stipulates a royalty in excess of one-eighth (1/8) of the production, or said lease shall be subject to an overriding royalty, to production payment or other obligation, then the lessee of said lease out of his share of the working interests from the well drilled on said unit, shall sustain and pay said excess royalty, overriding royalty, or production payment, and therefrom meet any other obligation due in respect to the separately owned tract or interest held by him. Laws 1947, p. 328, § 1.